IN THE

Supreme Court of the United States

October Term 1964

No. 313

JESSE ELLIOTT DOUGLAS, *Petitioner*

vs.

STATE OF ALABAMA, *Respondent*

PETITIONER'S BRIEF

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OPINION BELOW

The opinion of the Alabama Court of Appeals (R. 215-246) is reported at 163 So. 2d 477. The order of the Supreme Court of Alabama denying certiorari (R. 251) is reported at 163 So. 2d 496.

JURISDICTION

Petitioner contends that he has been deprived of his rights under the Constitution of the United States. Jurisdicion of this court is derived under 28 U.S.C. 1257 (c). The judgment of the Alabama Court of Appeals, affirming his conviction in the circuit court of Dallas County, Alabama, of assault with intent to murder, was rendered on October 8, 1963. (R. 209). The Supreme Court of Alabama denied certiorari on March 26, 1964, (R. 251) and the application for rehearing on April 30, 1964. (R. 252).

Petition for certiorari was filed in this court on July 22, 1964, and granted on October 12, 1964. (R. 253).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Section 1 of Amendment XIV to the Constitution of the United States which is as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

Is the defendant in a criminal trial deprived of due process of law when the prosecutor knowingly calls an alleged accomplice to the stand to secure from him a refusal to testify and when his presence on the stand is used as a pretense for reading to the jury an alleged confession of the witness which is inadmissible against the defendant?

STATEMENT OF THE CASE

On January 18, 1962, Charles Layman Warren was driving a truck in a southerly direction on highway 5 near its intersection with highway 80 in Dallas County, Alabama. (R. 73-82). About 2:30 a.m. a white Ford with one occupant, wearing a white shirt, passed him traveling in the same direction. (R. 74, 88) The right tail light was out and it had a Jefferson County tag. (R. 74, 88) Mr. Warren was shot and injured a few minutes later as a white, but otherwise unidentified, automobile passed him traveling in the opposite direction. (R. 73, 88)

About 5:00 a.m. J. E. Williamson, a state highway patrolman, stopped a white Ford automobile driven by Olen Ray Loyd in which petitioner was a passenger at a roadblock at the intersection of highways 5 and 11 in Bibb County, Alabama. He searched the car and found a pump shotgun and some shells, but no automatic shotgun. (R. 93-101) Loyd and petitioner were traveling from the direction of Tuscaloosa and when released proceeded south on highway 5 toward the scene of the shooting. (R. 93-95)

Petitioner and Loyd were stopped and arrested by a policeman, Aaron Teague, in Ohatchee, Alabama, about 8:00 a.m. (R. 103-104) Upon searching the car he found a pump shotgun and some shells, but no automatic shotgun. (R. 105) Although he described his search as casual, he made petitioner and Loyd get out of the car and he looked under the seat. (R. 105) Mr. Teague was acting on radio instructions from the Highway Patrol to stop petitioner and Loyd, and he did not know why they were being held. (R. 105-106) When a highway patrolman arrived, he turned Loyd and petitioner over to him. (R. 103)

Mr. Teague then drove Loyd's car to the Highway Patrol station in Anniston, twenty-one or two miles away, and left it unguarded behind the station. (R. 107) W. R. Jones, Chief Investigator for the State of Alabama, whose office is in Montgomery (R. 111) went to Anniston sometime during January 18 and took possession of the car. (R. 113) When he searched it he found a J. C. Higgins pump shotgun in the trunk (Pl's Ex. 26, R. 153, 164, erroneously described as Exhibit 25 at R. 113), and a Winchester automatic shotgun (Pl's Ex. 27 R. 153, 164) underneath the back seat. (R. 113, 114)

Chief Jones drove Loyd's car to Birmingham and a

Captain Godwin drove it from Birmingham to Montgomery, where it was locked up at the Highway Patrol office. (R. 113) About 10:00 a.m. the next day it was carried to the patrol shop and turned over to Robert Finley, with the State Toxicology Department. (R. 175) Mr. Finley and Chief Jones searched the car again and found a rifle (Plaintiff's Ex. 25 R. 151) between the grill and radiator. (R. 114) The two shotguns were on the back seat. (R. 153) Mr. Finley testified that in his opinion a shotgun hull (Ex. 2 R. 136), which was found on highway 5 nine and one-half miles north of the scene of the shooting of Mr. Warren, was fired from the Winchester automatic shotgun. (R. 162) The state did not check the car or any of the weapons for fingerprints. (R. 177)

Chief Jones took custody of Loyd and petitioner in Anniston. Later in the day he carried them to Birmingham, and turned them over to Sheriff Clark (Sheriff of Dallas County). (R. 112) Sheriff Clark had a warrant which he read to them. (R. 112)

On Saturday, January 20, 1962, at about ten or eleven o'clock p.m., Loyd signed a statement at the Dallas County jail. (R. 132-134) The statement was identified as Ex. 1, but not offered in evidence. It is set out at R. 121-130. Six officials were present when it was signed, but Mr. Loyd's attorney was not. (R. 132-134) However, his attorney was at the jail. (R. 117)

The Dallas County grand jury indicted petitioner for assault with intent to murder Charles Warren on January 23, 1962. (R. 1) The only evidence submitted to the grand jury was the testimony of Sheriff Clark, a shotgun hull, and Loyd's confession. (R. 48-65) On January 29, 1962, Judge Hare admitted petitioner to bail in the amount of $10,000. (R. 2)

On March 1, 1962, the jury returned a verdict of guilty against Loyd for assault with intent to murder, but he was not then sentenced or adjudicated. (R. 131) The same day petitioner's trial began. (R. 47)

During petitioner's trial the state called Loyd as a witness. (R. 118) After he was sworn, but before he was asked any questions, Mr. Esco, who was Loyd's attorney as well as petitioner's, objected to Loyd appearing on the stand. (R. 118) He stated Loyd had given notice of appeal and filed bond. The objection was overruled and Mr. Esco excepted. (R. 119)

Loyd answered his name, but to the question "Where is your home?" responded, "I refuse to answer on the grounds that any answer I give will tend to incriminate me." At the request of the prosecutor the court instructed Loyd that as a jury had determined his guilt he was required to answer. Loyd then stated he lived in Gadsden, Alabama. However, he again claimed his privilege not to testify to a question about his arrest. Petitioner's attorney objected, the court overruled and instructed Loyd to answer. Whereupon Loyd stated: "Not to my knowledge." (R. 119)

The same response was given to questions asking if he was in the Dallas County jail on January 20, 1962, and if he remembered talking to an FBI agent. (R. 120) The prosecutor requested the court to force Loyd to answer, Mr. Esco objected, and the court responded:

> "I can't force the witness to answer. All I can do is to tell him that he is in contempt of this court. That's all I can tell him." (R. 120)

After Mr. Esco advised the court that he had instructed Loyd not to answer any questions, the judge, prosecutor and defense attorney had a conference outside the courtroom. Then Loyd and Esco left the room. When the witness returned to the stand, Esco said:

> "At this time I move that this witness be excluded from the witness stand on the grounds that we have given notice of appeal in this case, that we are preparing a motion for a new trial, that he is privileged from constitutional law of the United States from testifying at this time and that he is claiming that right."

The court overruled and Mr. Esco excepted. (R. 120)

At the request of the prosecution the court declared Loyd a hostile witness and gave the state the privilege of cross-examination. (R. 121) Then the following occurred:

"Q. Is that your signature (showing witness signature on confession)?

A. I'm not sure.

Q. I will ask you if on January 20, 1962 —

Mr. Esco: (Interrupting) If your Honor please, I object to the reading of any document or purported confession, —

Mr. McLeod: (Interrupting) This is cross-examination.

The Court: Hostile witness. Overrule.

Mr. Esco: We except, if you please.

Q. I will ask you if on the night of January 20, 1962, in Selma, Alabama, in the Dallas County jail if you didn't make the following statement: (reading) 'I, Olen Ray Loyd, make the—'

Mr. Esco: (Interrupting) I object to this being read in the presence of the jury.

Mr. McLeod: You've already got an objection in there.

Mr. Esco: I object to this being read in the presence of the jury.

The Court: Overrule.

Mr. Esco: We except."

The prosecutor then read the statement to Loyd in the presence of the jury. (R. 121-128) After each paragraph he paused and asked Mr. Loyd if he had made that statement. In each instance Loyd refused to answer. Other than one comment by the judge the reading was not otherwise interrupted. The statement covers seven and one-half pages in the record. In the statement Loyd admitted participating in the crime but claimed that petitioner did the actual shooting. (R. 126)

The jury was excused and Mr. Esco again objected to the reading of the confession and moved to exclude it from evidence. When this was denied, petitioner's attorney moved for a mis-trial, which was also denied. (R. 129) The court instructed the prosecutor to prepare a contempt citation against Loyd and advised Mr. Esco that Loyd would remain in jail, "Just so long as he remain obdurate." (R. 129)

After the jury returned Loyd again stated he was not sure it was his signature on the confession. In response to a question did he make a statement, he replied: "Mr. McLeod, I'm not sure. I was under a lot of pressure then, and I don't know for sure." (R. 130) The jury was again excused and the court asked Loyd if he was willing to purge himself of contempt by testifying. He indicated in the affirmative. When the jury returned he again stated he was not sure it was his signature on the confession. (R. 130)

At this point, the court recessed the jury again, interrupted petitioner's trial, and sentenced Loyd to the maximum sentence of 20 years. His appeal bond was set at $50,000. (R. 131) Petitioner's attorney made another motion for a mistrial, which was overruled. (R. 132)

The prosecution then called to the stand Chief Jones, Lt. Holmes, an investigator for the Alabama Department of Public Safety, and Robert L. Frye, an F. B. I. agent, each of whom identified the confession as having been signed by Loyd in the Dallas County jail. After Chief Jones had identified the confession and the prosecutor indicated he did not intend to introduce it in evidence, Mr. Esco moved to exclude it from evidence, which motion was overruled. (R. 132-133)

The jury found the petitioner guilty. (R. 202) He was sentenced by the court to the maximum sentence of twenty years and his appeal bond set at $50,000.00. (R. 6) However, on March 15, 1962, the Court of Appeals of Alabama reduced the bond to $7,500.00. (R. 206)

Petitioner filed a motion for new trial on March 30, 1962. (R. 20) Ground 101 (R. 30) was based on the prejudicial misconduct of the prosecutor. Grounds 102 thru 145 related to the actions of the Court and prosecutor while Loyd was on the stand. (R. 30-42) Ground 155 alleged error as petitioner had been denied due process under the state and federal constitutions. (R. 46) The motion was denied on July 12, 1962. (R. 46).

The Alabama Court of Appeals affirmed the judgment of the trial court on October 8, 1963. (R. 209) Application for rehearing was filed October 23, 1963, (R. 247) and denied November 12, 1963. (R. 247) Petition for Writ of Certiorari was filed in the Supreme Court of

Alabama on November 27, 1963, (R. 248) and denied on March 26, 1964. (R. 251) An application for rehearing (R. 251) was overruled on April 30, 1964. (R. 252) The order of this court granting Certiorari on October 12, 1964, limited the issue to the question set out under Questions Presented for Review (R. 253).

SUMMARY OF ARGUMENT

The question presented for review involves two rules of law, both of which apply to two factual situations. During petitioner's trial the prosecutor called to the stand an alleged accomplice, who refused to testify on the ground of self-incrimination. While the accomplice, Loyd, was on the stand, the prosecutor read, in the presence of the jury, a confession alleged to have been made by Loyd, implicating the petitioner as a participant in the crime. The confession was not admissible against petitioner and was not offered in evidence.

Petitioner contends that the calling of Loyd to the stand to secure from him a refusal to testify, and the reading of the confession constituted such prejudicial misconduct by the prosecutor as to deny petitioner a fair trial. The inferences created in the minds of the jury by each of these acts of the prosecutor added critical weight to the state's case in such a form as to effectively deny petitioner the right of cross-examination. Thus, petitioner was deprived of procedural due process.

The opinion of the Alabama Court of Appeals does not deal directly with any of these issues. Petitioner's contention that his rights were violated by the prosecutor calling Loyd to the stand was not discussed. It was merely stated in the opinion that Loyd's claim of immunity was

personal and he had the right to waive it. The court held that petitioner waived his rights relative to the reading of the confession by the failure of his attorney to object.

Petitioner's argument may be summarized as follows:

1. The holding that petitioner waived his rights as to the reading of the confession is not supported by the record. An examination of page 121 of the record reveals that the petitioner's attorney objected to Loyd's confession being read in the presence of the jury when the prosecutor first began reading. Petitioner continued to make objections until the prosecutor admitted adequate reservation of error. This court has a duty to make its own independent examination of the record to protect petitioner from any deprivations of his constitutional rights. *Napue v. Illinois,* 360 US 264. The record clearly shows the petitioner reserved his constitutional rights by making timely objection to the reading of the confession.

2. In *Mooney v. Holohan,* 294 US 103, the court enunciated the principle that prejudicial misconduct by the prosecutor deprives a defendant in a criminal trial of due process. The official position of a prosecutor gives him a unique influence over the jury. *Berger v. United States,* 295 US 78. That official position was abused by the prosecutor when he read Loyd's confession to the jury during petitioner's trial. The state contends that his action could be justified as an attempt to refresh Loyd's memory. However, the witness refused to testify on constitutional grounds. The contents of the confession which the prosecutor read had no relation to the questions he had previously asked Loyd. The prosecutor failed to follow the procedure prescribed in *Kissic v. State,* 266 Ala. 71, 94 So 2d 202, 67 ALR 2d 530, for refreshing the memory of a witness outside the hearing of the jury. Long after it

became clear the witness had no intention of answering the prosecutor persisted in reading the ten page document. The determination of the prosecutor to have the jury hear the contents of the inadmissible confession constituted such prejudicial misconduct as to deny petitioner due process.

3. In our system of jurisprudence the right of cross-examination is a vital feature for testing truth. *Green v. McElroy*, 360 US 474. It is a fundamental right which is protected from infringement by the Fourteenth Amendment. *Wilmer v. Committee*, 373 US 96; *In re Oliver*, 333 US 257. The reading of Loyd's confession by the prosecutor added critical weight to the prosecution's case against petitioner in a form which denied him the right of cross-examination. Regardless of the motives of the prosecutor, the use by him of the hearsay confession to obtain petitioner's conviction deprived petitioner of procedural due process.

4. The principle of *Mooney v. Holohan*, 294 US 103, also applies to the misconduct of the prosecutor in calling Loyd to the stand to secure from him a refusal to testify.

In *Kaplow v. State*, 157 So 2d 862 (Fla 1963) the court outlined five criteria for determining whether or not a prosecutor had deprived a defendant of a fair trial by calling a witness who refused to testify. The circumstances of this case meet each of these criterion: (a) because of Loyd's complicity with the activities of the petitioner, the inference drawn from his refusal to testify tended to prejudice petitioner in the eyes of the jury; (b) the prosecutor had no reason to believe Loyd would testify; (c) as Loyd's conviction in his companion case was not final, he had the right to refuse to testify. *State v. Johnson*,

77 Idaho 1, 287 P 2d 425, 51 ALR 2d 1386; (d) petitioner's attorney promptly objected to Loyd being called to the stand; (e) the court failed to instruct the jury not to draw any inferences against petitioner because of Loyd's refusal to testify.

As no inference could be made against Loyd for his refusal to testify, *Slochower v. Board of Higher Ed. of City of N. Y.*, 350 US 551, the misconduct of the prosecutor in creating an inference by the jury against petitioner deprived petitioner of due process.

5. The implications from Loyd's refusal to testify added to the state's case against petitioner and are far beyond the reach of effective cross-examination. *Fletcher v. United States*, 332 F 2d 724 (CA-D.C.). Petitioner's conviction based on inferences which the jury may have drawn from this spectacle is a denial of due process.

ARGUMENT

1. *Petitioner Reserved His Constitutional Rights By Making Timely Objection To The Prosecutor Reading Loyd's Confession To The Jury.*

The portion of the opinion of the Alabama Court of Appeals holding that petitioner waived his rights relative to the prosecutor reading Loyd's confession is as follows:

> "After the solicitor read portions to him and Loyd began claiming immunity for self-crimination throughout the twenty-one questions, Douglas' counsel stopped objecting.
>
> "In this state of the record, even though it might be claimed that the repeated and cumulative use of the confession might have been an indirect mode of getting the inadmissible confession in evidence, yet the failure

to object was waiver. There must be a ruling sought and acted on before the trial judge can be put in error. Here there was no ruling asked or involved as to the questions embracing the alleged confession." (R. 244).

The holding of a waiver based on failure to object is not supported by the record. This court has a duty to make its own independent examination of the record to protect against deprivations of the constitution. *Napue v. Illinois,* 360 US 264; *Jacobellis v. Ohio,* 84 S Ct 1676. When Mr. McLeod, the prosecutor, first began reading from the confession, the following occurred:

"Q. I will ask you if on January 20, 1962 - - -

Mr. Esco: (Interrupting) If your Honor please, I object to the reading of any document or purported confession, - - -

Mr. McLeod: (Interrupting) This is cross-examination.

The Court: Hostile Witness. Overrule.

Mr. Esco: We except, if you please.

Q. I will ask you if on the night of January 20, 1962, in Selma, Alabama, in the Dallas County jail if you didn't make the following statement: (reading) "I, Olen Ray Loyd, make the....."

Mr. Esco: (Interrupting) I object to this being read in the presence of the jury.

Mr. McLeod: You've already got an objection in there.

Mr. Esco: I object to this being read in the presence of the jury.

The Court: Overrule.

Mr. Esco: We except."

(R. 121).

The record is clear that the defendant's attorney continued the objection until the prosecutor admitted adequate reservation of error. To have made additional objections would have been useless and an affront to the dignity of the court. The finding by the Alabama Court of Appeals that the defendant's attorney failed to object is clearly contrary to the record.

2. *The Misconduct By The Prosecutor In Reading Loyd's Confession To The Jury Deprived Petitioner Of Due Process.*

The principle is well settled that where misconduct on the part of the prosecutor deprives the defendant in a criminal case of a fair trial, the defendant has been denied due process of law in violation of the Fourteenth Amendment. The rule was first enunciated in *Mooney v. Holohan*, 294 US 103. Through the years this principle has been extended to various forms of prosecutorial misconduct.[1]

Mr. Justice Douglas, speaking for the court in *Brady v. Maryland*, 373 US 83 (1963), said:

> "The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor, but avoidance of an unfair trial to the accused."

Because of the official position of the prosecutor, his actions have a special effect upon the jury. When he uses unfair methods and plays upon the prejudice of the jury to obtain a conviction, the defendant is deprived of a fair trial. In *Berger v. United States*, 295 US 78, the court said:

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[1]See *Napue v Illinois*, 360 US 264, for citations of examples of this development.

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The court in *Powell v. Wiman*, 287 F 2d 275 (CA 5), stated that the above quotation is equally applicable to state prosecuting attorneys.

The actions of the prosecutor in the present case reveal a complete disregard for the rights of both the petitioner and Mr. Loyd, who was called as a witness. After Loyd had invoked his constitutional right not to testify, the prosecutor continually brow-beat him. On one occasion he requested the court to force him to testify. (R. 120) When Loyd refused to respond to his questions about the confession, he merely read it to the jury. (R. 121-129)

Because he knew the confession was not admissible against the petitioner, the prosecutor did not offer it. (R. 132) However, in order to insure that the jury got the full prejudicial effect of the confession, after he had read it, he called three officials to the stand who testified they saw Loyd sign the statement. (R. 132-136)

The Alabama Court of Appeals held that the reading of the confession was permissible to refresh Loyd's mem-

ory. This holding is in direct conflict with the Alabama Supreme Court holding in the case of *Kissic v. State*, 266 Ala 71, 94 So 2d 202, 67 ALR 2d 530, where the court reversed a conviction because the solicitor was allowed to refresh the memory of a witness by playing a recording within the hearing of the jury. The court said:

> "If the purpose of playing the record was to let the witness hear it, that result could have been achieved out of the hearing and presence of the jury. It is obvious from reading the transcript that the state's purpose in having the record played was to have the jury hear it and impeach the witness."

The Alabama Court of Appeals attempted to distinguish the *Kissic* case because there a recording was involved and here a written statement. However, the court in *Kissic* suggested an alternative to playing the recording outside the presence of the jury: the recording could have been transcribed and the witness allowed to read it silently. It is the hearing by the jury of the prejudicial statement that violates petitioner's rights. The distinction drawn by the Alabama Court of Appeals is artificial to the point of being ludicrous.

In *People v. Thomas*, 359 Mich 257, 102 SW 2d 475, the court held that the reading of a lengthy hearsay statement by the prosecutor in the presence of the jury under the pretense of refreshing the recollection of the witness violated the defendant's rights under both the state and federal constitutions. The court said:

> "If, in truth, it is the desire of counsel merely to 'refresh' the recollection of a witness it may be done by permitting the witness to read the document intended to trigger the memory, under which procedure, of course, its content does not go before the jury, or to withdraw

the jury and read the statement aloud, the procedure necessarily employed when the witness is blind or illiterate. Either procedure accomplishes the refreshing of memory, if that is, in truth, the purpose, and that without compromising the fundamental guarantees of the citizen accused of crime."

The prosecutor's motive in reading the confession is clear. It was neither to impeach the witness (which is also improper) nor refresh his recollection. He had not testified as to anything to be impeached. What specific facts could the prosecutor have desired to refresh in his memory? It is true that after the court had ordered him to testify in spite of his claim of privilege, he was evasive in response to questions about his arrest, incarceration, and the signature on the confession. However, the confession makes no reference to his being jailed and only one small reference to his arrest. (R. 127) It is inconceivable that the prosecutor could have thought that the reading of the ten page statement would have resulted in the witness providing any additional testimony. In any event the prosecutor had ample, uncontested evidence that Loyd had been arrested, jailed in Dallas County, and signed the statement.

If the prosecutor had wanted only to refresh Loyd's memory why was it necessary to read the statement in front of the jury? He could have followed either procedure prescribed in *Kissic*—merely shown the document to Loyd for him to look at and read silently, or ask that the jury be excused before reading it aloud. His insistence on reading the document in front of the jury, over the objection by the petitioner's attorneys, clearly shows it was his intention for the jury to hear the contents of the confession.

After the prosecutor began reading the confession, para-

graph by paragraph, and Loyd repeated his refusal to testify on constitutional grounds, any possible claim of refreshing his memory ceased. The ensuing charade served no purpose but to allow the jury to hear the remainder of the confession. It was then clear that Loyd did not intend to answer. The court in *State v. Dinsio,* 200 NE 2d 467 (Ohio 1964) held that as the prosecutor had reason to believe a witness would testify, his refusal to testify was not reversible error. However, error was committed when the prosecutor persisted in asking questions after the witness had invoked his rights not to testify. In *Namet v. United States,* 373 US 179, Justice Black in his dissenting opinion said:

> "I believe it was error for the trial court to permit the prosecuting attorney in the presence of the jury to ask questions which he well knew the witness would refuse to answer on the grounds of self-incrimination."

Even though the confession was not introduced in evidence the state depended heavily upon it for the conviction. Except in the confession the only reference to petitioner in the evidence was his identification as a passenger in Loyd's car on two occasions, both several hours after the shooting. Except in the confession he was not connected with any of the many exhibits introduced by the state. Except in the confession, there is no evidence that petitioner ever had the gun in his possession that the state claims was used in the shooting. In the narration of facts in the state's brief in the Alabama Court of Appeals the details of the confession were recited as if they were in evidence. Even Judge Cates in writing the opinion for the Alabama Court of Appeals referred to a change in license plates as evidence against the defendant (R. 245), when it was not referred to anywhere in the record except in the confession.

The prosecutor has misused his office. No conclusion can be drawn from his actions except that he was bent upon obtaining a conviction—by fair means or foul. The intentional use by him of the illegal evidence to obtain a verdict effectively deprived the defendant of the rudimentary demands of justice.

3. *As Petitioner Was Deprived Of The Right To Cross-Examine The Implications Of Loyd's Confession He Was Denied Of Due Process*

The petitioner contends in the foregoing section that the prosecutor deprived him of due process of law by intentionally and knowingly reading Loyd's confession to the jury to obtain a conviction on evidence he knew to be inadmissible. However, even if it were done innocently or ignorantly, he deprived petitioner of due process by use of the confession under circumstances where the petitioner was denied the right of cross examination.

The Sixth Amendment right to confrontation, which includes the right of cross-examination, has ancient roots and the court is zealous to protect these rights from erosion. *Greene v. McElroy*, 360 US 474. In *Anderson v. United States*, 318 US 350, the court held that the use of inadmissible confessions in a conspiracy case constituted reversable error, even for those defendants against whom they were not admitted. Although this court has never specifically held that the states are bound by the federal requirements of confrontation, in *Snyder v. Massachusetts*, 291 US 97, the court assumed that the privilege is reinforced by the Fourteenth Amendment.

The trend in recent cases has been toward the position taken by Justice Douglas in his dissent in *Poe v. Ullman*, 367 US 497, that the Fourteenth Amendment incorporated

all of the first eight amendments. See the Gitlow Doctrine Down To Date by Paul C. Bartholomew, American Bar Journal, Vol. 50, No. 2, p. 139. In *Malloy v. Hogan*, 378 US 1, the court held the federal rules protecting the individual from self-incrimination under the Fifth Amendment are applicable to the states under the Fourteenth. The right to counsel provided by the Sixth Amendment is "fundamental and essential to a fair trial" and is made obligatory upon the states by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 US 335.

In *Wilmer v. Committee*, 373 US 96, the court held that a state could not deny a license to an applicant to the bar without a hearing and an opportunity to confront witness who impugned his good character. Justice Douglas speaking for the court said:

> "We think the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this."

Justice Black in the opinion for the court in *In re Oliver*, 333 US 257, described the right to examine the witnesses against him as one of the minimum requirements of the basic rights under our system of jurisprudence.

The highest courts of several states have indicated that the right of cross-examination is essential to due process under the federal constitution. In *Pettit v. Rhay*, 62 W 2d 515, 383 P 2d 899, the court was limited to a federal question on a habeas corpus. The court said:

> "In the case at bar, no meaningful cross examination of the complaining witness could be made at all and this was through no fault of the accused. To convict the accused and sentence him to a maximum term of twenty years, confinement in the state penitentiary upon the uncross-examined testimony of a fifteen-year-old girl

is to deprive him of that fundamental fairness in the conduct of his trial which is guaranteed him by the applicable provisions of both the state and federal constitutions."

The court in *People v. Thomas*, 359 Mich 257, 102 SW 2d 475, said:

"The prosecutor was permitted to place before the jury statements most damaging to the defendant, made in the late hours of the night by a woman who had undergone a shattering emotional experience, when, obviously, the defendant was not present and thus could neither confront nor cross-examine his accuser. Such procedure is forbidden by both the State and the Federal Constitutions."

See also *Baker v. State*, 150 So 2d 729, (Fla 1963), *Young v. State*, 890 O. Crim 395, 208 P 2d 1141.

However, in *Stein v. New York*, 346 US 156, the court held that the introduction in a joint trial of confessions of two defendants did not deprive a third defendant of due process. The court in an opinion by Justice Jackson said:

"Basically, Wissner's objection to the introduction of these confessions is that as to him they are hearsay. The hearsay-evidence rule, with all its subtleties, anomalities and ramifications, will not be read into the Fourteenth Amendment.* * *

"Perhaps the methods adopted by the New York courts to protect Wissner against any disadvantage from the State's use of the Cooper and Stein confessions were not the most effective conceivable. But its procedure does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give surer promise of protection to the prisoner at the bar."

Even if the states are not bound by the federal hearsay rules in their entirety, the Fourteenth Amendment proscribes that the state must provide some procedure to

protect an accused from the prejudicial use of evidence from which he is denied the right of cross-examination. The rule in the Kissic case provides such protection in Alabama. Legitimate use of hearsay statements can be made outside the hearing of the jury. The problem presented by the joint trial in *Stein* is not present in Alabama as defendants in criminal courts are entitled to separate trials. *Code of Alabama,* Title 15, Section 319.

The court in *Greene vs. McElroy,* 360 US 474, quoted from 5 *Wigmore on Evidence* (3d ed. 1940) § 1367, as follows:

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

In addition to testing the truthfulness and worthiness of the statements in the confession pertaining to petitioner, adequate cross-examination would have brought to light the circumstances under which the statement was given. At the time he made the confession Loyd had been kept in a super-heated cell (called the "hot box") for several days. He had been illegally detained without a hearing to set bond, illegally moved from county-to-county to make it difficult for his attorneys to locate him, and held incommunicado. His attorney and wife were kept waiting for several hours outside in the jail lobby and were not allowed to see him until he made the statement. See *Loyd v. State,* .....Ala. App..... (decided 10-8-63). Loyd

now has a petition for certiorari pending in the Alabama Supreme Court. In view of the striking similarity to the circumstances with those in *Escabedo v. Illinois*, 84 S Ct 1758 (1964), a reversal of his conviction is anticipated. See also *Massiah v. United States*, 84 S Ct 1199 (1964) and *People v. Dorado*, 40 Cal R 264, 394 P 2d 952.

It would be a travesty upon justice if a statement made by Loyd under such circumstances that it could not be used against him, could be used to convict petitioner. See *McClure v. State*, 95 Tex Crim 53, 251 SW 1099.

The trial court allowed the state to use Loyd's confession to bolster its case against the petitioner. The manner in which it was done denied petitioner the right to confront and cross-examine the witness against him. Under these circumstances the petitioner was denied the essential elements of a fair trial.

4. *The Misconduct Of The Prosecutor In Calling Loyd To The Stand To Secure From Him A Refusal To Testify Deprived Petitioner Of Due Process.*

The principle of *Mooney v. Holohan*, 294 US 103, applies to the misconduct of the prosecutor in calling a witness to the stand for the purpose of forcing him to invoke his constitutional rights against self-incrimination as well as to the reading of the confession. In *De Gesualdo v. People*, 147 Colo 426, 364 P 2d 874, the court reversed the conviction because of the misconduct of the prosecutor in calling a witness to the stand who refused to testify. The court said:

> "A district attorney, although in a sense a partisan, is a judicial officer sworn to uphold the constitution and obligated to refrain from invalid conduct creating an atmosphere prejudicial to the substantial rights of the defendant."

The court in *Kaplow v. State*, 157 So 2d 862, (Fla 1963) quoted from *Annotation*, 86 ALR 2d 1443, the circumstances under which the defendant is deprived of a fair trial, as follows:

> " . . . (1) that the witness appears to have been so closely implicated in the defendant's alleged criminal activities that the invocation by the witness of a claim of privilege when asked a relevant question tending to establish the offense charged will create an inference of the witness' complicity, which will, in turn, prejudice the defendant in the eyes of the jury; (2) that the prosecutor knew in advance or had reason to anticipate that the witness would claim his privilege, or had no reasonable basis for expecting him to waive it, and, therefore, called him in bad faith and for an improper purpose; (3) that the witness had a right to invoke his privilege; (4) that the defense counsel made timely objection and took exception to the prosecutor's misconduct; and (5) that the trial court refused or failed to cure the error by an appropriate instruction or admonition to the jury."

The courts of Texas have been particularly vigorous in protecting a defendant from the implication of a witness refusal to testify. *Washburn v. State*, 164 Tex Crim 448, 299 SW 2d 706; *Rice v. State*, 121 Tex Crim 68, 51 SW 2d 364; *McClure v. State*, 95 Tex Crim 53, 251 SW 1099; *Garland v. State*, 51 Tex Crim 643, 104 SW 898.

The Alabama Court of Appeals merely evaded the issue in petitioner case with the following language:

> "Douglas can take nothing from the ruling of the court of Loyd's claim of immunity from self-crimination. The privilege is personal. Had Loyd waived it, Douglas would have been confronted with testimony legal to use against him. *Beauvoir Club v. State*, 148 Ala 643, 42 So 1040; 8 Wigmore, Evidence (McNaughton rev. 1961), § 2259."

(R. 239)

The petitioner's submits that where all of the circumstances exist as quoted previously from *Kaplo v. State*, 157 So 2d 862, (Fla 1963), the prosecutor has committed such gross misconduct as to deprive the defendant of a fair trial and due process of law under the principle of *Mooney v. Holohan*, 294 US 103. In the present case each of these circumstances exist and will be discussed in the order listed.

(1) Loyd was an alleged accomplice in the commission of the crime for which the defendant was accused. He had made a confession in which he claimed the defendant did the actual shooting. Other than the confession, which was read to the jury but not admitted in evidence, the only evidence against the petitioner was a number of exhibits taken from Loyd's car and the identification of petitioner as passenger in Loyd's car on two occasions several hours after the shooting. The refusal of Loyd to testify on the grounds that his testimony may incriminate him necessarily implied in the minds of the jurors that it would also incriminate petitioner.

(2) The prosecutor has not claimed that he had any reasonable basis to expect Loyd to testify. He had every reason to anticipate that he would refuse. Loyd had repudiated his confession and refused to testify on his own behalf the previous day. After Loyd had been called and sworn, but before he had been asked any questions, his attorney objected to his appearing on the stand and stated that he had given notice of appeal of Loyd's conviction on the previous day. In *De Gesualdo v. People*, 174 Colo 426, 364 P 2d 874, the court recited similar occurances and said:

> "It is apparent that the district attorney could not have possibly entertained a good faith belief that Ciccarelli would testify if called and thus the inference is that this was a studied attempt to bring to the attention

of the jury his refusal to testify and his claim of the 'Fifth Amendment'."

Had the prosecutor only wanted to determine if Loyd would testify, he could have done this outside the presence of the jury, by analogy to the *Kissic* rule.

(3) On page 8 of its brief, in reply to the petition for certiorari, the respondent cites three cases for the proposition that one who has been convicted[2] may be compelled to testify. *United States v. Cioffi*, 242 F 2d 475 (CA 2); *United States v. Gernie*, 252 F 2d 664 (CA 2), certiorari denied 356 US 968; *United States v. Romero*, 249 F 2d 372 (CA 2). None of these apply to Loyd. At the time he was called to the stand no judgment of conviction had been entered against him. Judgment and sentence was rendered against him after he refused to testify. (R. 131)

The witnesses in both *Cioffi* and *Gernie* had pleaded guilty and been sentenced. The witness in *Romero* had been convicted and sentenced in juvenile proceedings. The court in *Cioffi* said that the termination of the proceeding against the witness was "crucial".

Prior to being called to the stand, Loyd had given notice of his intent to appeal from the verdict of the jury. *Ex parte Loyd*, 155 So 2d 519 (Ala). Although the Alabama Court of Appeals affirmed his subsequent conviction on appeal, the case is now pending on an application for certiorari to the Alabama Supreme Court. In view of this Court's recent holdings in *Escabedo v. Illinois*, 84 S Ct 1758, and *Massiah v. United States*, 84 S Ct 1199, it is likely certiorari will be granted and Loyd given a new

[2] "This term has a definite signification in law, and means that a judgment of final condemnation has been pronounced against the accused. Gallagher v State, 10 Tex App 469". Black's Law Dictionary—Third Edition, p. 432.

trial. See also, *People v. Dorado,* 40 Cal R 264, 394 P 2d 952.

In *State v. Johnson,* 77 Idaho, 287 P 2d 425, 51 ALR 2d 1386, certiorari denied 350 US 1007, the court held that a defendant in a companion case who had been convicted, but had given notice of appeal, could not be compelled to testify. The court said:

> "His testimony or aspects thereof, if given as a witness at appellant's trial, might well react adversely and tend to incriminate him, should he be granted a new trial upon disposition of his pending appeal. Under the circumstances the trial court properly allowed Fedder to assert his constitutional immunity." See also, *Mills v. United States,* 281 F 2d 736 (CA 4).

Even if his conviction was final, he still had the right to refuse to testify. Had he testified, he may have been forced to involve himself in crimes, other than the one for which he was convicted. He was subsequently indicted, along with twenty other defendants, for violation of 18 USC 1951 and for conspiring to violate 18 USC 1281 and 18 USC 1951.

The indictment not only indicates that his testimony may have been used against him in the federal prosecution (from which he is protected by this court's ruling in *Murphy v. Waterfront Commission,* 378 US 52), but also implicates him in several enumerated overt acts which could constitute violations of state laws. At the same time Loyd gave the state authorities the statement used in this case, he also gave an agent of the F.B.I. a more comprehensive statement. Any testimony by Loyd about the confession may have led to disclosures of associations and acts implicating him in other crimes, both state and federal. *Malloy v. Hogan,* 378 US 1.

(4) The petitioner's attorney, who was also Loyd's attorney, objected to the witness appearing on the stand before any questions had been asked of him. (R. 118) He excepted to the court's adverse ruling. (R. 119) He later made a motion that the witness be excluded from the stand, which was also overruled. (R. 120).

(5) The trial court not only failed to give the jury appropriate instructions, but by his rulings and comments gave the jury reason to assume the refusal of the witness to testify should be used against the defendant. On several occasions he ordered Loyd to testify. (R. 119-129). At the request of prosecutor he declared Loyd a hostile witness because of his invocation of his constitutional rights. (R. 121) After the prosecutor had completed the reading of the confession and Loyd still refused to testify, the court excused the jury and ordered the prosecutor to file contempt proceedings. The jury was brought back in and another attempt was made to coerce Loyd into testifying. When he again refused the court excused the jury again, interrupted petitioner's trial, and sentenced Loyd to the maximum sentence for his conviction the preceding day. The court also increased Loyd's appeal bond from $7,500. to $50,000. The jury could not help but be aware of the judge's attitude toward Loyd. The court's disapproval of Loyd invoking his rights against self-incrimination reacted adversely to the petitioner in the minds of the jury. The court approved the misconduct of the prosecutor—he even assisted it. This in itself is sufficient to prejudice the jury and deprive petitioner of a fair trial by an impartial jury.

The circumstances in the present case should be distinguished from the situation in *Namet v. United States*, 373 US 179, where the witness willingly testified, but

merely refused to answer isolated questions in the long interrogation. See *Fletcher v. United States*, 332 F 2d 724, (CA-D.C.).

In *Slochower v. Board of Higher Ed. of City of N. Y.*, 350 US 551, the court held that a statute which automatically discharged a teacher who invoked his right against self-incrimination violated due process. The court condemned the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. If no inference can be made against the one who invokes the privilege, the use of such an inference against another just as effectively violates due process as to him.

However, it would be too much to expect a lay jury not to conclude that Loyd's refusal to testify should not adversely affect petitioner. With this knowledge, the prosecutor misused the powers of his office in placing Loyd on the stand to wring from him a refusal to testify. This prosecutorial misconduct, under the circumstances in the present case, prejudiced the jury and denied petitioner a fair trial.

5. *As Petitioner Was Deprived Of The Right To Cross-Examine The Implications Of Loyd's Refusal To Testify He Was Denied Due Process.*

All of the state cases involving a prejudicial trial because of the refusal of a state's witness to testify proceed on the theory of prosecutorial misconduct. However, the implications from Loyd's refusal to testify were beyond effective cross-examination. The rules of law discussed with reference to the right to cross-examine the contents of the confession, apply equally to the putting of Loyd on the stand.

The failure of the right to cross-examine the implications from the invocation of constitutional rights was discussed in *Namet v. United States*, 373 US 179. In *Fletcher v. United States*, 332 F 2d 724 (CA-DC), the court reversed the conviction because prosecutor called an accomplice to the stand and was allowed to ask him several questions, to each of which he refused to answer. The circumstances outlined by the court were similar to the questioning of Loyd, except the court gave no cautionary instructions to the jury. The court said:

> "We are of opinion that in the circumstances of this case, viewed in their entirety, inferences from Anderson's refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced Fletcher. They affect his substantial rights."

CONCLUSION

Petitioner submits that because of the misconduct of the prosecutor and the denial to him of the right to cross-examine the witnesses used against him, he had been denied a fair trial and due process of law. The judgment of conviction against him should be reversed and he should be granted a new trial.

Respectfully submitted,

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